

JUDGE WEIGHING ELLSBERG MOTION

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Curb Sought by Defense in
Evidence on Three Counts
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LOS ANGELES, Feb. 5—The defense in the Pentagon papers trial asked the judge today to preclude the Government from presenting evidence based on two of the "top secret" docu-

ments in this case. The judge said he would consider the request.

If granted, this would have the practical effect of throwing out two of the eight espionage counts and one of the six theft counts against Daniel Ellsberg. None of the three counts involved Dr. Ellsberg's co-defendant, Anthony J. Russo Jr. There is also a conspiracy count against them.

The motion was made by Leonard B. Boudin, one of Dr. Ellsberg's attorneys, on the ground that there exists exculpatory evidence in the two documents and that the two documents are the only ones

involved in those particular counts. Mr. Boudin cited as precedent the Federal Rules of Criminal Procedure.

One of the documents involved is a volume of the 47- volume Pentagon papers and the other is the 1954 Geneva Accord memorandum. In the indictment against the defendants, they are accused of misusing 18 volumes of the Pentagon papers, the 1954 Geneva Accord memorandum and a 1968 Joint Chiefs of Staff memorandum.

Involved in Mr. Boudin's motion were count six of the indictment and counts eight and 13. In six, a theft count, Dr. Ellsberg is accused of convey-

ing "without authority" one of the diplomatic volumes of the papers to Vu Van Thai, a former South Vietnamese Ambassador to the United States, who came to oppose the war in Vietnam. Mr. Thai has been named as co-conspirator in this case but not a defendant.

The name of the volume involved is "The United States-Vietnam Relations 1945-67: Settlement of the Conflict - Negotiations, 1967-1968, History of Contacts."

United States District Court Judge William Matthew Byrne Jr., who is presiding, has ruled that the volume contains exculpatory evidence - evidence that would tend to prove the innocence of the defendants. In this case, it consists of the Government's own analyses to the effect that disclosure of portions of the 20 documents in this case, including this volume, did not damage the national defense. To prove espionage, the Government must first prove that the national defense was injured.

Two Espionage Counts

Counts eight and 13 are espionage counts against Dr. Ellsberg. Eight accuses him of "for the purpose of obtaining information about the national defense" taking the 1954 Geneva Accord memorandum from the Rand Corporation in Santa Monica.

The judge has ruled that there exists exculpatory evidence on the accord memorandum. In count 13, Dr. Ellsberg is accused of unlawful possession of the same volume in count six and of transmitting that volume to Mr. Thai; only in this count the volume is said to relate to the national defense, which makes it an espionage charge.

While Judge Byrne did not rule on this motion, he told the defense that he was not going to let the jury know, at this point in the trial, about the

week-long argument over exculpatory evidence and the fact that the Government had been withholding it.

The jury returned to court today for the first time in a week. Testimony had been halted while the arguments before the judge over the evidence were being presented.